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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 HENRY DAVIDIAN,) NO. CV 06-7801-E
12)
13 Plaintiff,)
14)
15 v.) ORDER RE "PETITION FOR
16)
17 MICHAEL J. ASTRUE, COMMISSIONER) AWARD OF ATTORNEY FEES UNDER
18 OF SOCIAL SECURITY ADMINISTRATION,)
19) 42 U.S.C. § 406(b)"
20 Defendant.)
21 _____)
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18 PROCEEDINGS
19

20 On May 6, 2008, counsel for Plaintiff filed a "Petition for
21 Award of Attorney Fees Under 42 U.S.C. § 406(b), etc." ("the
22 Petition"), seeking \$11,553. Defendant filed a response on June 5,
23 2008, purportedly taking no position as to whether the requested fee
24 is reasonable, but listing certain factors for the Court's
25 consideration. The Court has taken the Petition under submission
26 without oral argument. See Local Rule 7-15; May 7, 2008 Minute
27
28

1 Order.¹

2
3 **BACKGROUND**
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5 Plaintiff filed an application for Title II benefits with the
6 Social Security Administration in October 2003, asserting disability
7 since August 1, 1999. See Administrative Record, filed May 16, 2007
8 ("A.R.") pp. 60-62. After the Administration denied Plaintiff's
9 application initially and on reconsideration, an Administrative Law
10 Judge ("ALJ") conducted a hearing and issued an unfavorable decision
11 (A.R. 18-22, 42-43, 272-314). When the Appeals Council denied
12 Plaintiff's application for review, Plaintiff filed an action in this
13 Court (A.R. 4-6; Complaint filed on December 8, 2006). On July 30,
14 2007, the Court reversed the Commissioner's decision and remanded the
15 case for further administrative proceedings. See July 30, 2007 Order
16 Adopting Findings, Conclusions and Recommendations of United States
17 Magistrate Judge; see also July 10, 2007 Report and Recommendation of
18 United States Magistrate Judge. The Commissioner subsequently awarded
19 disability benefits to Plaintiff totaling approximately \$75,715.40.
20 See Exhibit A filed with the Petition (indicating \$57,162.40 payment
21 of past due benefits to Plaintiff and \$18,553 withheld for attorney
22 fees).

23
24 Counsel now petitions for \$11,553 in fees for time spent before
25 the Court pursuant to 42 U.S.C. section 406(b) and the parties' fee
26 agreement. See Petition, pp. 2-3 (requesting \$18,553 withheld, less
27

28 ¹ The parties filed a consent to proceed before a United States Magistrate Judge on June 11, 2008.

1 \$7,000 counsel previously recovered under section 406(a) for time
 2 spent before the Administration); Exhibit B filed with the Petition
 3 (fee agreement).² Counsel acknowledges that any fee award must be
 4 offset by the \$2,073.14 in attorney fees that counsel previously
 5 recovered under the Equal Access to Justice Act ("EAJA"). See
 6 Petition, p. 10; 28 U.S.C. § 2412.

8 **APPLICABLE LAW**

10 Under 42 U.S.C. section 406(b), the Court may allow attorney
 11 fees in a "reasonable" amount, not to exceed 25 percent of the total
 12 past-due benefits awarded to the claimant. The Court has an
 13 independent duty to ensure that a section 406(b) contingency fee is
 14 reasonable. See id.; Gisbrecht v. Barnhart, 535 U.S. 789 (2002)
 15 ("Gisbrecht").

17 Section 406(b)(1) of Title 42 provides:

19 Whenever a court renders a judgment favorable to a
 20 claimant . . . who was represented before the court by

22 ² The Ninth Circuit's recent holding in Clark v. Astrue,
 23 529 F.3d 1211 (9th Cir. 2008) does not affect the present Petition.
 24 In Clark, the Ninth Circuit held that the 25 percent cap on fees
 25 under section 406(b) is not a cap for total fees awarded under
 26 section 406(a) and 406(b). Id. at 1215-16 (noting that combined
 27 406(a) and 406(b) fees can exceed 25 percent of past due benefits).
 28 Here, the parties' fee agreement, which caps total fees at 25
 percent of past due benefits, governs. See Exhibit B to Petition;
see also Gisbrecht v. Barnhart, 535 U.S. 789, 807 (2002) (noting
 that Section 406(b) "does not displace contingent-fee agreements as
 the primary means by which fees are set for successfully
 representing Social Security benefits claimants in court").

1 an attorney, the court may determine and allow as part
2 of its judgment a reasonable fee for such
3 representation, not in excess of 25 percent of the total
4 of the past-due benefits to which the claimant is
5 entitled . . . In case of any such judgment, no other
6 fee may be payable . . . for such representation except
7 as provided in this paragraph. 42 U.S.C. §
8 406(b)(1)(A).

9
10 According to the United States Supreme Court, section 406(b)
11
12 does not displace contingent-fee agreements as the
13 primary means by which fees are set for successfully
14 representing Social Security benefits claimants in
15 court. Rather, § 406(b) calls for court review of such
16 arrangements as an independent check, to assure that
17 they yield reasonable results in particular cases.
18 Congress has provided one boundary line: Agreements
19 are unenforceable to the extent that they provide for
20 fees exceeding 25 percent of the past-due benefits.
21 Within this 25 percent boundary . . . the attorney for
22 the successful claimant must show that the fee sought is
23 reasonable for the services rendered. Gisbrecht v.
24 Barnhart, 535 U.S. 789, 807 (2002) (citations omitted).

25
26 The hours spent by counsel representing the claimant and
27 counsel's "normal hourly billing charge for noncontingent-fee cases"
28 may aid "the court's assessment of the reasonableness of the fee

1 yielded by the fee agreement." Id. at 808. The Court appropriately
2 may reduce counsel's recovery

3
4 based on the character of the representation and the
5 results the representative achieved. If the attorney is
6 responsible for delay, for example, a reduction is in
7 order so that the attorney will not profit from the
8 accumulation of benefits during the pendency of the case
9 in court. If the benefits are large in comparison to
10 the amount of time counsel spent on the case, a downward
11 adjustment is similarly in order.

12
13 Id. (citations omitted); see also Kerr v. Screen Extras Guild, Inc.,
14 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976)
15 (identifying factors relevant to adjustment of an attorney's
16 lodestar figure).

17 18 **DISCUSSION**

19
20 The Court finds that the "the fee sought is reasonable for the
21 services rendered." While the fee sought, together with the section
22 406(a) fee counsel already recovered, equals roughly the agreed-upon
23 25 percent of past-due benefits, the fee is not unreasonable given the
24 number of hours counsel spent in representing Plaintiff before this
25 Court. Neither "the character of the representation" nor "the results
26 the representative achieved" suggest the unreasonableness of the fee
27 sought. Plaintiff's counsel was not responsible for any significant
28 delay in securing Plaintiff's benefits.

1 Counsel, who has been practicing Social Security law since
2 1979, reports an hourly billing rate of \$490. See Petition at 9.
3 Counsel reasonably spent a total of 18.9 hours representing Plaintiff
4 before this Court. See Exhibit C to Petition. If compensated
5 according to his hourly rate, counsel would receive:

$$6 \qquad \qquad \qquad \$490.00 \times 18.9 = \$9,261.00$$

8
9 If counsel receives the \$11,553 406(b) fee requested (\$18,553 - \$7,000
10 406(a) fee recovered from the administration), however, counsel will
11 receive a fee equivalent to roughly 1.25 times this hourly rate (i.e.,
12 \$611.27 per hour) for time spent before the Court. This Court has
13 previously found rates greater than this *de facto* rate to be
14 reasonable for section 406(b) fee requests. See, e.g., Hodges v.
15 Astrue, Case No. CV 05-2829-E, Opinion and Order Granting in Part
16 Counsel's Motion for Attorney Fees Pursuant to 42 U.S.C. Section
17 406(b), filed March 28, 2008 (where counsel had not reported any
18 standard hourly rates, choosing a standard or prevailing hourly rate
19 of \$250 for counsel (multiplied by a factor of 2.5 for a *de facto*
20 hourly rate of \$625) as reasonable); Barry v. Astrue, Case No. CV 04-
21 649-E, Opinion and Order Granting in Part Counsel's Motion for
22 Attorney Fees Pursuant to 42 U.S.C. Section 406(b), filed December 10,
23 2007 (same); Cherry v. Astrue, Case No. EDCV 05-393-E, Opinion and
24 Order Granting in Part Counsel's Motion for Attorney Fees Pursuant to
25 42 U.S.C. Section 406(b), filed December 3, 2007 (same); Wood v.
26 Astrue, Case No. CV 01-7622-E, Order Granting in Part Counsel's Motion
27 for Attorney Fees Pursuant to 42 U.S.C. § 406(b), filed June 11, 2007
28 (same); see also Gisbrecht, 535 U.S. at 808 (counsel's normal hourly

1 billing rates can aid court's interpretation of reasonableness);
2 Hodges-Williams v. Barnhart, 400 F. Supp. 2d 1093, 1099-1100 (N.D.
3 Ill. Dec. 6, 2005) (reducing fees to a *de facto* hourly rate judge
4 deemed reasonable based on judge's own experience in private practice
5 and with the court); Lewis v. Barnhart, 2004 WL 3454545 *1 (W.D. Va.
6 Jun. 11, 2004) (reducing fees to *de facto* hourly rate generally
7 approved by court in noncontingency fee cases).

8
9 Under the totality of the circumstances, comparison of the
10 benefits secured and the time Plaintiff's counsel spent on the case
11 does not suggest the unreasonableness of the fee sought.

12
13 **CONCLUSION**

14
15 The motion is granted. Section 406(b) fees are allowed in the
16 amount of \$11,553, to be paid out of the sums withheld by the
17 Commissioner from Plaintiff's benefits. Counsel shall reimburse
18 Plaintiff in the amount of \$2,073.14, previously paid by the
19 Government under the EAJA.

20
21 IT SO ORDERED.

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23 DATED: July 25, 2008

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25 _____/S/_____
26 CHARLES F. EICK
27 UNITED STATES MAGISTRATE JUDGE
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